

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Millbrae, California)

WEST COAST CONFECTIONS, INC.
d/b/a CHARLOTTE'S CONFECTIONS 1/

Employer

and

BAKERY, CONFECTIONERY, TOBACCO
WORKERS UNION AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL 125

Petitioner

20-RC-17997

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 3/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c)(1) and Section 2(6) and (7) of the Act. 4/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 5/

All full-time and regular part-time production and maintenance employees including assembly workers, assembly supervisor, cooks, assistant cooks, technical engineers, janitors and warehouse workers employed by the Employer at its Millbrae, California facility; excluding all other employees, seasonal employees, managerial employees, guards and supervisors 6/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by BAKERY, CONFECTIONERY, TOBACCO WORKERS UNION AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 125.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB. Wyman-Gordan Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before December 17, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by December 24, 2004.

Dated: December 10, 2004.

at San Francisco, California

/s/ Robert H. Miller

Regional Director, Region 20

- 1/ The Employer's name is in accord with the stipulation of the parties and the record evidence.
- 2/ The parties stipulated, and I find, that the Employer, a California corporation with an office and place of business located at Millbrae, California, is engaged in the business of manufacturing chocolate candies and other confections. The parties further stipulated, and I find, that during the calendar year ending December 31, 2003, the Employer derived gross revenues in excess of \$1,000,000 and purchased goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of California. Based on the parties' stipulation to such facts, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.
- 3/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 4/ No party contends that a contract bar exists to bar the processing of this petition.
- 5/ The Petitioner seeks to represent a unit comprised of all full-time and regular part-time production and maintenance employees, including assembly workers, cooks, assistant cooks, technical engineers, janitors and warehouse workers employed by the Employer at its Millbrae, California facility; excluding all seasonal employees, guards and supervisors within the meaning of the Act. The Employer contends that the unit should include only cooks and assistant cooks and that Production Coordinator James MacIntire and Assistant Supervisor Jesus (Judy) Perez should be included in the unit. The Petitioner would exclude MacIntire and Perez from the unit. The record reflects that there are approximately 17 employees in the unit.

Stipulation to Exclude Seasonal Employees. The parties stipulated, and I find, that the following seasonal employees are excluded from the unit: Maria L. Buendia de Cruz, Gleniss Diaz-Molina, Judith Flores-B, Josefina Gudino-Sandoval, Jose Hernandez, Magdalena M. Lopez, Delfina Martinez, Margarita Navarro, Cecilla G. Pelayo, Remigio Portilla-Perez, Vanessa Ramos, and Gonzalez Gerado Sanchez.

The Employer's Operation. As noted above, the Employer manufactures chocolate candy and other confections at its Millbrae, California facility. The Employer's facility consists of a single building, which is comprised of a kitchen, "enrobing area," storage area, packing area, retail area, shop and offices.

The Employer is headed by General Manager Barnett Tessler. Under Tessler is Production Coordinator Jim MacIntire. MacIntire has an office at the facility and is responsible for overseeing the production schedule and the shipping and packaging departments. MacIntire and Tessler prepare the production schedule and assign employees to perform particular tasks. MacIntire performs no cooking, packaging, or shipping work. MacIntire and Tessler are also involved in evaluating employees. Decisions involving the discipline and promotion of employees are handled by Tessler and Controller/Human Resources Director Darlene Schonefield. However, the record reflects that MacIntire also has input into such decisions. MacIntire also directs the assembly workers in their jobs. If employees are sick, they notify MacIntire and he has authority to rearrange work schedules to cover for absent employees. MacIntire is also involved in ensuring that products are made according to the correct formula and packaged in the correct containers and he also handles the paperwork associated with the shipment of candy to customers. He is salaried and paid at a rate equivalent to \$27.91 an hour.

The Cooks & Assistant Cooks. The Employer employs three cooks and three assistant cooks who prepare and cook the chocolate confections and other candy produced by the Employer. Head Cook Jose Chavez assembles the cooking materials and directs the other cooks in preparing the chocolate candy using the schedule given to him by Production Coordinator MacIntire. The assistant cooks move the candy into the enrobing area where chocolate is poured over it and move finished candy into the staging area. The cooks and assistant cooks are hourly paid. They begin work between 5:30 a.m. and 7 a.m.

The Assembly Workers. The Employer employs approximately ten assembly workers, who move the product from the staging area into the packing area and pack it into boxes, tins, bags, etc. After the product is packed, the assembly workers move it into the shipping area. The assembly workers are also hourly paid. They begin work between 8 a.m. and 10:30 a.m.

Shipping Clerk & Janitor. The Employer also employs a shipping clerk, Ricardo Hinostroza who is also referred to in the record as a warehouse worker. Hinostroza is responsible for loading boxes containing packaged products onto pallets and, using a forklift, placing the pallets onto commercial trucks for delivery to the Employer's customers. Hinostroza is hourly paid and begins work at 8 a.m.

The Employer also employs one janitor, who begins work at 4 p.m. and is responsible for cleaning the Employer's facility. The record reflects that the Employer also employs a technical engineer, Carlos Neves, whom the Petitioner seeks to include in the unit. The Petitioner did not contest his

inclusion. The record contains little evidence concerning Neves' job, except that he performs maintenance work.

Interchange, Working Conditions, Wage Rates & Fringe Benefits. The assembly workers do not have the cooking skills of the cooks and assistant cooks and there is no evidence of interchange between the cooks, assistant cooks and the assembly workers or other employees.

The Employer has an employee handbook that is given to all full-time employees. All full-time employees receive the same fringe benefits. All employees use the same break room and all hourly paid employees punch the same time clock. Wage rates range from \$9.50 an hour for an assembly worker to \$35.45 an hour for Head Cook Jose Chavez. Most of the assembly workers earn between \$9.70 and \$11.70 per hour and the three assistant cooks earn \$9.50, \$14.50 and \$14.90. The technical engineer earns \$21.00 an hour. No party contends that the head cook or the technical engineer should be excluded from the unit and there is no showing in the record that they are managerial employees or supervisors under the Act.

Assembly Supervisor Jesus (Judy) Perez. Perez coordinates the assembly/packaging department and oversees and directs the work of the ten assembly workers. The record reflects that she does not hire, fire, grant time off or schedule employees. She also does not write employee appraisals and does not make recommendations regarding the promotions of other employees. Nor is there any evidence that she makes effective recommendations regarding any other types of personnel actions. Perez spends about 75% of her time packaging candy, as do the assembly workers included in the petitioned-for unit. The remainder of her time is spent directing the assembly workers and coordinating the packing department and ensuring that the work is being done correctly. She is paid \$21 an hour, which is about twice the rate of most of the assembly workers. She is the most senior worker in the assembly department. The next most senior assembly worker earns \$11.70 an hour.

Analysis: Whether the Petitioned-for Unit Is An Appropriate Unit. As noted above, the Petitioner seeks to represent a basically wall-to-wall unit comprised of all production and maintenance employees, including assembly workers, cooks, assistant cooks, technical engineers, janitors and warehouse workers employed by the Employer at its Millbrae, California facility. The Employer contends that the unit should be limited to include only cooks and assistant cooks.

As the Board recently observed in *Barron Heating & Air Conditioning, Inc.*, 343 NLRB No. 58 (October 29, 2004), the "touchstone for determining whether a bargaining unit is appropriate is a community of interest analysis. The Board determines whether the employees in the petitioned-for unit share a sufficient community of interest in view of their duties, functions, supervision, and other terms

and conditions of employment. *Johnson Controls, Inc.*, 322 NLRB 669, 670 (1996), *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). In the instant case, the record shows that the cooks and assistant cooks perform different duties than do the other eleven employees, and do not interchange with them because of the skill required to prepare the candy produced by the Employer. However, all of the petitioned-for employees work in the same facility and are part of a small, highly integrated production process. The record does not establish that the employees in the different classifications have separate immediate supervision. All employees are managed by General Manager Tessler and Production Coordinator MacIntire. All petitioned-for employees are hourly paid, punch the same time clock, share the same break room and receive the same fringe benefits. All are given the same employee handbook containing rules governing their conduct. Although there are differences in the wages of employees, I do not find that this is a controlling factor.

After carefully considering all of the foregoing factors and the record as a whole, I have concluded that the petitioned-for unit, as amended at the hearing, and modified to include the assembly supervisor for the reasons discussed below, is an appropriate unit for collective bargaining purposes.

- 6/ Whether Production Coordinator Jim MacIntire and Assembly Supervisor Jesus (Judy) Perez Should Be Included In the Unit. As noted above, the Petitioner seeks to exclude Production Coordinator MacIntire from the unit on the basis that he is a statutory supervisor or managerial employee and to exclude Assembly Supervisor Perez from the unit on the basis that she is a statutory supervisor. The Employer asserts that both MacIntire and Perez should be included in the Unit.

The term “supervisor” is defined in Section 2(11) of the Act as:

“[A]ny individual having authority, in the interest of the Employer-Petitioner, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986) An individual who exercises some “supervisory authority” only in a routine,

clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, *supra*; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers." *Oil Workers v. NLRB*, *supra*, at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

After carefully considering the record, I have concluded that the evidence supports a finding that MacIntire is a statutory supervisor. Thus, the evidence shows that MacIntire is the second in command at the Employer's facility and that he participates with the general manager in deciding the production schedule and in scheduling and assigning work to employees and in overseeing production at the facility. In addition, secondary indicia also support this conclusion, including that MacIntire is salaried at a rate equating to \$27.91 an hour; he works in an office; and he performs no production or packaging work.

Accordingly, I find that MacIntire is a statutory supervisor and is properly excluded from the unit. Given his exclusion on this basis, there is no need to make a determination as to his managerial employee status, and I make no finding in this regard.

Assembly Supervisor Jesus (Judy) Perez . As noted above, the Petitioner seeks Perez's exclusion as a statutory supervisor and the Employer takes the position that she should be included in the unit.

In the instant case, the record shows that Perez spends 75% of her time performing the same work as do the other assembly workers included in the unit. The record shows that the remainder of her time is spend overseeing, directing and coordinating the work of the assembly/packaging employees. MacIntire makes the scheduling decisions for the assembly workers, and there is no evidence that Perez's duties involve anything beyond the routine direction of the assembly workers' daily tasks, which appear to be repetitive in nature. The record shows that she does not hire or fire, grant time off, write employee appraisals or make recommendations regarding employee promotions. Nor is there evidence that she makes effective recommendations regarding any other types of personnel actions involving employees. As indicated above, titles and secondary indicia, such as the fact that Perez is called a supervisor or is paid more than her co-workers, are not sufficient, standing alone, to establish supervisory status in the absence of evidence of her possession of the types of authority set forth in Section 2(11) of the Act. Accordingly, I find that the Union has failed to sustain its burden to prove that Perez is a statutory supervisor and the position of assembly supervisor is included in the unit.